LIBRARY
SUPREME COURT, U. S.

FILED
NOV 1968
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 705

JOSEPH Q. CIPRIANO,

Appellant,

versus

CITY OF HOUMA, G. LESLIE BROUSSARD, Mayor, CHRISTIAN L. OLIVIER, CHARLES DAVIDSON, PETER BOURGEOIS, JR., SAMUEL LUSCO and WILBERT P. BONVILLAIN,

Appellees.

On Appeal from the United States District Court for the Eastern District of Louisiana.

MOTION TO AFFIRM

E. E. HUPPENBAUER, JR.
707 National Bank of Commerce Building
New Orleans, Louisiana 70112
Counsel for Appellees.

INDEX

	PAGE
MOTION TO AFFIRM	3
STATEMENT	3
ARGUMENT	4
Questions presented are not so substantial as to require plenary consideration by this Court	4
The decision of the District Court is correct	8
Harper v. Virginia State Board of Elections is not controlling in this instance	9
Real Issue is public power vs. private power	10
CONCLUSION	12
CERTIFICATE	13

CITATIONS

STATUTES

UNITED STATES CODE TITLE 28, SEC. 2281	4
SEC. 2284	4

CASES

U. S. SUPREME COURT: *CARRINGTON V. RASH*, 380 U.S. 89, 85 S.Ct. 775, 13 L.Ed. 2d 675	9

HARPER V. VIRGINIA STATE BOARD OF ELECTIONS, 383 U.S. 663, 86 S.Ct. 1079, 16 L.Ed.2d 169 (1966) 8

LASSITER V. NORTH HAMPTON COUNTY BOARD OF ELECTION, 360 U.S. 45, 79 S.Ct. 985, 3 L.Ed. 2d 1072 9

LOUISIANA V. UNITED STATES, 380 U.S. 145, 85 S.Ct. 817 9

REYNOLDS V. SIMS, 377 U.S. 533, 84 S.Ct. 1362 (1964) 9

WALTERS V. CITY OF ST. LOUIS, 347 U.S. 231, 237, 74 S.Ct. 505, 98 L.Ed. 660 (1954) . 10

OTHERS:

CITY OF HOUMA V. LOUISIANA POWER & LIGHT COMPANY, No. 29,960 17th Judicial District Court, Parish of Terrebonne, State of Louisiana 11

CITY OF THIBODAUX V. LOUISIANA POWER & LIGHT COMPANY, 126 So. 2d 24 (See also footnote No. 1 at page 11) .. 11

KRAMER V. UNION FREE SCHOOL DISTRIGT NO. 15, 282 F. Supp. 70 (U.S. Sup. Ct. Docket No. 258, jurisdiction noted October 14, 1968) 10

LOUISIANA POWER & LIGHT COMPANY V. CITY OF HOUMA, No. 30,014 17th Judicial District Court, Parish of Terrebonne, State of Louisiana 11

MISCELLANEOUS

UNITED STATES SUPREME COURT RULE 16 3

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 705

JOSEPH Q. CIPRIANO,

Appellant,

versus

CITY OF HOUMA, G. LESLIE BROUSSARD, Mayor, CHRISTIAN L. OLIVIER, CHARLES DAVIDSON, PETER BOURGEOIS, JR., SAMUEL LUSCO and WILBERT P. BONVILLAIN,

Appellees.

On Appeal from the United States District Court for the Eastern District of Louisiana.

MOTION TO AFFIRM

Appellees, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, move that the final judgment and decree of the District Court be affirmed on the ground that the questions presented are so unsubstantial as not to warrant further argument.

STATEMENT

This is a direct appeal from the final judgment

and decree entered on July 25, 1968, by a district court of three judges specially constituted pursuant to 28 U.S.C. Sections 2281 and 2284, dismissing appellant's complaint which sought an injunction to prevent the City of Houma from issuing utility revenue bonds approved by a vote of the property taxpayers at a special election and which further sought a judgment declaring that the provisions of Louisiana law under which the election was held violated the federal constitution.

Appellant brought this action in the United States District Court for the Eastern District of Louisiana and the District Court dismissed the complaint on the ground that appellant was not denied equal protection of the laws in violation of the Fourteenth Amendment of the Constitution of the United States.

ARGUMENT

QUESTIONS PRESENTED ARE NOT SO SUBSTANTIAL AS TO REQUIRE PLENARY CONSIDERATION BY THIS COURT

Not only has appellant failed to cite laws of other states similar to the provisions of the Louisiana Constitution and statutes pursuant to which the City of Houma is authorized to issue utilities revenue bonds, appellant has failed to indicate to this Court that there exists in other jurisdictions of these United States statutes or laws of such number or significance as to cause a substantial interest in the issue now before this Court. We submit that the provisions of the Louisiana Constitution and statutes are not identical to the laws of other states, or a substantial number thereof, because of the complete control and discretion

vested in the governing authority (the elected officials) to initiate and ultimately authorize the issuance of such bonds, the necessity of obtaining of approval from a state board (Louisiana State Bond and Tax Board), and the submission of the proposition to issue such bonds to the property taxpayer voters for approval. The submission of the proposition to the electorate is only one of several of the conditions pursuant to which these bonds may be issued. Furthermore, even if all of such approvals are obtained, such bonds cannot be issued and sold without the elected officials of the political subdivision actually authorizing the ultimate issuance and sale thereof by separate and affirmative official action.

Appellant's argument that all citizens of the City have a vested interest since the funds derived from the operation of the utilities system inure to the benefit of the general fund is misleading. Initially, bonds must be sold to construct and/or improve the utilities system and the revenues derived from the operation of said system must be first dedicated to the cost of operating said system, the payment of principal and interest on bonds, the establishment of reserves therefor, and the establishment of funds for contingencies and for the normal expansion and growth requirements of the system. All of these dedicated purposes have a prior claim to the revenues derived from the operation of the utilities system and not until full satisfaction thereof can funds be transferred to other governmental functions of the City. But above all, appellant fails to give recognition to the fact that the rate and charges which must be paid by the citizens of the City are fixed solely in the discretion of the elected

officials of the City. Whether the citizen be a property owner or not, if he is a registered voter he has the right to elect the public officials who fix the utility charges for the operation of the utilities system and who have full discretion and control over the issuance and sale of revenue bonds. The voter's representative therefore initiates and finally approves the issuance of the bonds, and fixes the rates and charges to service such debt; the voter cannot be expected to vote twice on such an administrative function.

There is a vast distinction to be made in a case such as this, involving, as it does, a local administrative election, and the exercise of the voting franchise for the selection of legislative officers responsible, in the final analysis, of the course of government. The present statutory election is merely a restriction imposed by the Louisiana Legislature as a matter of public policy; there is no inherent federal or state constitutional requirement that any election be held. Under the circumstances, if property owners in the instance before this Court have a special interest in the subject matter to which the statute is directed, considered in light of the kind and purpose of the election required by the statute to be held, such special interest constitutes a rational basis for classification. There is no "invidious" discrimination here, absent which the statute must be held constitutional. This is a local administrative election, the essence of which is to perform an advisory function dealing not with the legislative or governmental character of the political subdivision, but with the purely private and business, or proprietary, functions of the political subdivision.

The undertaking of the ownership of a public utility, even though the bonds issued for the acquisition of the facility are payable only from revenues, commits the public corporation to the management and operation of the public enterprise, and a quasi-corporate function. We submit that property owners whose property and property values will be affected by the efficiency and adequacy of the utility serving their property do have an additional and special pecuniary interest in this decision. While it is true that all users of the system pay for the service, the initial decision to publicly own and operate the utility, or to improve if after acquisition, are matters of special and peculiar interest to the property owners, (whether as occupants, landlords or owners of unimproved property) because the value and even the basic security of their investment in the property are at stake, dependent as they are on proper, reasonable, and well managed utility service. The non-property owner shares none of this particular concern nor bears any of this particular risk, and if the wrong decision is made or services poor, his control, like that of the property owner, is through the ballot box at the election for municipal officials.

Although personal property, as well as real property is taxed in Louisiana and in the City of Houma, assessment and enforcement procedures are such that few people who do not own real property are called upon to pay a tax on whatever personal property they own. We note, by the way, that appellant does not allege that he owns no taxable property, only that he owns no real property and does not pay ad valorem taxes on any such property.

The relief which appellant is asking this court to grant is inappropriate to the right contended for. Appellant is not seeking a declaration of his right to vote at some specific election in the future, but to enjoin the issuance of bonds voted at an election in which he did not even attempt to participate.

THE DECISION OF THE DISTRICT COURT IS CORRECT

The decision of the lower court is clearly correct. In considering whether a classification rests on a real difference, the lower court correctly took into account the nature and the relative importance of the subject with respect to which equality is asserted. In interpreting *Harper v. Virginia State Board of Elections*, 383 U.S. 663, 86 S.Ct. 1079, 16 L.Ed.2d 169 (1966), the case relied upon by appellant as controlling in this instance, the lower court correctly set forth the holding in said case that the Equal Protection Clause of the Fourteenth Amendment prevents a state from exacting a poll tax as a condition to the right to vote in state elections. The *Harper* case only prevents states from fixing voter qualifications which invidiously discriminate. It does not declare that the Fourteenth Amendment abrogates the power of the states to classify voters. Appellant, as all other registered taxpayers of the City of Houma, have full sufferage in the election of the municipal governing body as well as the election of the Louisiana Legislature. The approval or dissent of registered property owners at an election called by a municipal governing body to issue utilities revenue bonds is not an election for general government purposes but only concerns itself with a step in the process of the administrative functions of the mu-

nicipality. This type of distinction is considered important in determining what is required to afford equal protection to voters.

HARPER V. VIRGINIA STATE BOARD OF ELECTIONS IS NOT CONTROLLING IN THIS INSTANCE

In addition to the many reasons cited by the majority opinion of the District Court, we submit that the *Harper* case is not controlling in this instance. In the *Harper* case this Court was concerned solely with those requirements for voting which relate to "one's ability to participate intelligently in the electoral process" and in reaching its decision, the Court cited as authority and relied on *Lassiter v. North Hampton County Board of Election*, 360 U.S. 45, 79 S.Ct. 985, 3 L.Ed. 2d 1072; *Carrington v. Rash*, 380 U.S. 89, 85 S.Ct. 775, 13 L.Ed. 2d 675; *Louisiana v. United States*, 380 U.S. 145, 85 S.Ct. 817; and *Reynolds v. Sims*, 377 U.S. 533, 84 S.Ct. 1362 (1964). The *Lassiter* case involved literacy tests for voters, the *Carrington* case involved the voting rights of members of the armed forces, the *Louisiana* case invalidated the "grandfather clause" requirement for voters and the *Reynolds* case involved legislative reapportionment. In all of these cases there was involved the election of officials as distinguished from elections concerning bond issues and other administrative matters. In the *Harper* case, this Court further concluded that a State violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee the electoral standard. However, there appears to be a distinct voting requirement rationale which focuses on the "interests" of the voter rather than upon his

competence or affluence. Residence requirements are one example of the application of that rationale, and taxpayer requirements are another. That "affluence" is not a constitutionally unpermissible principle of classification is evidenced by several currently accepted concepts such as that of a taxpayers' suit. Equal protection does not require identity of treatment. It only requires that classification rest on real and not feigned differences, that the distinction have some relevance to the purpose for which the classification is made, and that the different treatments be not so disparate, relative to the difference in classification, as to be wholly arbitrary. *Walters v. City of St. Louis,* 347 U.S. 231, 237, 74 S.Ct. 505, 98 L.Ed. 660 (1954).

Appellees are aware that only recently did this Court note probable jurisdiction in the case of *Kramer v. Union Free School District No. 15,* 282 F. Supp. 70 (Docket No. 258, jurisdiction noted October 14, 1968). However, the *Kramer* case like the *Harper* case involves voter classification in the elction of public officials, not a local administrative election, and even if this Court reverses the decision of the lower court, the *Kramer* decision should be distinguished from the instant case.

REAL ISSUE IS PUBLIC POWER VS. PRIVATE POWER

The record reveals that the plaintiff in this case is an employee of the Louisiana Power & Light Company, a privately owned public utility which furnishes electric power to a substantial number of residents of the State of Louisiana. Although appellant characterizes this litigation as being founded upon the issues of constitutional reapportionment and civil rights in

broadening the franchise and striking down allegedly antiquated concepts of property ownership as a qualification for voting, this litigation is basically an economic contest between "public power" and "private power", where a municipal owned utility seeking to expand its services is being bitterly opposed by a local private power company. Plaintiff's concern in his testimony was that the City was to acquire the facility in his geographical area of the City where the Louisiana Power & Light Company is presently furnishing electric power. That a municipally owned utility has the right to expropriate electric generating and servicing facilities within its geographical limits is well established.[1] In fact, the City of Houma has recently instituted an expropriation proceeding against the Louisiana Power & Light Company and said Company has likewise filed a similar proceeding against the City of Houma with respect to the facilities owned by the City outside of its geographical territory.[2] We submit that the civil rights argument advanced by appellant is solely a device employed on behalf of his employer to prevent condemnation or other municipal acquisition of its facilities or service area (or merely

[1] *City of Thibodaux v. Louisiana Power & Light Company,* 126 So. 2d 24 (La. App. 1-1961), cert. den. In the course of that litigation, LP&L removed the state court proceedings to federal court, the doctrine of abstention threw the case back to state court, and then finally allowed the case to come on for a hearing on the merits, from which appeals again were taken. *City of Thibodaux v. Louisiana Power & Light Company,* 153 F.Supp. 515 (ED La. - 1957), reversed on other grounds, 255 F 2d 744, reversed, 360 US 25. See also: 225 F.Supp. 657 (ED La. - 1963), affirmed in part, reversed in part, 373 F.2d 870 (CA 5-1967), cert. denied, 389 US 975.

[2] *City of Houma v. Louisiana Power & Light Company,* No. 29,960 of the docket of the 17th Judicial District Court for the Parish of Terrebonne, State of Louisiana; *Louisiana Power & Light Company v. City of Houma,* No. 30,014 of the docket of the 17th Judicial District Court for the Parish of Terrebonne, State of Louisiana.

to bargain for a higher purchase price). The upheaval of long established judicial precedents restricting bond elections to property taxpayers, where a real interest is vested in such taxpayers, in reliance upon which many millions of dollars of securities have been issued in good faith and presently remain outstanding, would suggest that this case does not present a bona fide case or controversy in which it would be either prudent, necessary or appropriate for this Court to go out of its way to overturn such a weight of precedence and to precipitate uncertainly as to vast amounts of outstanding governmental securities which might provoke a nuclear chain reaction of endless litigation to resolve the consequences of the Court being led down a path by a litigious private utility concerned solely with its own economic betterment and with obstructing the right of a municipality to provide a low cost utility service for the general welfare of the citizenry.

CONCLUSION

We respectfully submit, therefore, that the appellant presents no substantive questions for the decision of this Court, and that the judgment and decree of the District Court should be affirmed.

Respectfully submitted,

.....

E. E. HUPPENBAUER, JR.
707 National Bank of Commerce Building
New Orleans, Louisiana 70112
Counsel for Appellees.

November 27, 1968

CERTIFICATE

I hereby certify that a copy of the foregoing motion to affirm has been served upon opposing counsel of record and all other counsel of record in the District Court by depositing a copy thereof in the United States Mail, postage pre-paid, addressed to their addresses of record.

New Orleans, Louisiana, November 27, 1968

.....

E. E. HUPPENBAUER, JR.